

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

KOSAL NHEK,

Plaintiff,

v.

**ULINE, INC., ALBERT BURNS,
FERNANDO OCHOA, JASON
BECHER, and DOES 1 through 10,
inclusive,**

Defendants.

Case No.: EDCV 17-01057-CJC(AGR_x)

**ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND TO SAN
BERNARDINO SUPERIOR COURT**

I. INTRODUCTION

On March 22, 2017, Plaintiff Kosal Nhek filed this action in San Bernardino Superior Court against Defendants Uline, Inc., Albert Burns, Fernando Ochoa, Jason Becher, and Does 1 through 10, inclusive, for (1) disability discrimination in violation of

1 the California Fair Employment and Housing Act (“FEHA”), Cal. Gov. Code §§ 12940 *et*
2 *seq.*; (2) retaliation in violation of FEHA; (3) disability harassment in violation of FEHA;
3 (4) failure to make reasonable accommodations in violation of FEHA; (5) failure to
4 engage in the interactive process in violation of FEHA; (6) retaliation in violation of the
5 California Family Rights Act, Cal. Gov. Code §§ 12945.2 *et seq.*; (7) failure to remedy or
6 prevent discrimination, harassment, and retaliation in violation of FEHA; (8) retaliation
7 in violation of Cal. Gov. Code § 6310; (9) wrongful termination in violation of public
8 policy; (10) defamation; (11) failure to provide rest breaks in violation of Cal. Lab. Code
9 §§ 226.7 and 516; and (12) failure to pay all wages due upon termination in violation of
10 Cal. Lab. Code §§ 201 *et seq.* (*See generally* Dkt. 1-1 [Complaint, hereinafter
11 “Compl.”].) All causes of action are brought against Uline and Doe Defendants only,
12 except for disability harassment in violation of FEHA, which is brought against all
13 Defendants, and defamation, which is brought against Uline and Becher. (*See id.*)
14 Defendants removed the case to this Court on May 25, 2017. (Dkt. 1.) Before the Court
15 is Mr. Nhek’s motion to remand. (Dkt. 13 [Motion, hereinafter “Mot.”].) For the
16 following reasons, the motion is GRANTED.¹

17 18 **II. BACKGROUND**

19
20 According to the Complaint, Mr. Nhek is a resident of California and, during the
21 operative time period, was an employee of Defendant Uline. (Compl. ¶ 1.) Uline is
22 incorporated in Delaware, but Mr. Nhek claims Uline’s principal place of business is in
23 California, while Uline claims it is in Wisconsin. (*See id.* ¶ 2; Mot. at 18; Dkt. 14
24 [Opposition, hereinafter “Opp.”] at 1.) Between November 18, 2008, and November 13,
25 2012, Mr. Nhek received generally positive ratings from his employer— “fair,”
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27
28 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
for August 7, 2017, at 1:30 p.m. is hereby vacated and off calendar.

1 “satisfactory,” “above satisfactory,” “excellent,” and “outstanding.” (Compl. ¶¶ 9–13.)
2 On May 12, 2014, however, Mr. Nhek injured his back at work while lifting bundles. (*Id.*
3 ¶ 14.) “The injury was reported to his manager, [sic] and Safety Coordinator, Mark
4 Paul,” who “declined to send him to the medical clinic, but rather demonstrated the
5 proper technique for lifting bundles.” (*Id.*) Mr. Nhek was then put on Uline’s “5-day
6 light duty program,” which according to the Complaint is “designed to prevent injured
7 employees from being seen at the clinic on the day of the injury, and the Company
8 incurring a recordable event.” (*Id.* ¶ 15.) After returning to full duty, on June 4, 2014,
9 Mr. Nhek again experienced back pain and asked his manager if he could go home. (*Id.*
10 ¶¶ 16–17.) His manager refused and instead sent him to do more labor-intensive work.
11 (*Id.* ¶ 17.) Mr. Nhek then “felt the sensation of muscles starting to rupture, and he injured
12 himself.” (*Id.*) Mr. Nhek returned to work the next day and felt a sharp pain in his lower
13 back which he reported to his manager, and was again put on the light duty program. (*Id.*
14 ¶¶ 18–19.) He alleges that his manager was under the impression that Mr. Nhek’s claim
15 was “fraudulent” because he was trying to avoid working overtime. (*Id.* ¶ 20.)

16
17 On June 6, 2014, “Dave Vasquez documented that Mr. Nhek was upset because his
18 back was hurting. He was challenged by his manager, Tony Alvarado, for the way he
19 reported the injury and made to apologize for being frustrated about the injury.” (*Id.*
20 ¶ 21.) Nhek insisted that he be evaluated at the clinic, was again placed on light duty,
21 and returned to full duty on June 27, 2014. (*Id.* ¶ 22.) On June 11, 2014, Dave Vasquez
22 documented that the injury was the result of Mr. Nhek’s “[f]ailure to properly execute,”
23 “[r]ushing,” and “chancetaking [sic].” (*Id.* ¶ 23.) Mr. Nhek filed a Workers’
24 Compensation claim on June 17, 2014. (*Id.* ¶ 24.)

25
26 On July 1, 2014, Mr. Nhek notified Defendant Albert Burns, Uline’s Assistant
27 Manager, that loading trailers was causing him back pain. (*Id.* ¶ 25.) Mr. Nhek was
28 placed in another position, but again complained to Mr. Burns. (*Id.*) Once again, Mr.

1 Nhek was place on light duty through October 2, 2014. (*Id.* ¶ 26.) Mr. Nhek's
2 performance review that year was "poor." (*Id.* ¶ 27.)
3

4 On April 24, 2015, another Uline employee dropped a picnic table during a two-
5 man lift, which struck Mr. Nhek's left leg and caused a two-inch laceration. (*Id.* ¶ 28.)
6 Although the incident was reported to Mr. Paul, he was not sent to the clinic. (*Id.*) Mr.
7 Nhek's back was re-injured lifting 80-pound table tops on May 15, 2015, and he reported
8 the incident to his manager, Defendant Fernando Ochoa, but was again put on light duty
9 and not sent to the clinic. (*Id.* ¶ 29.) On September 28, 2015, Mr. Nhek injured his back
10 lifting a product with a coworker, and reported the incident to his managers, Mr. Ochoa
11 and David Siggins. (*Id.* ¶ 30.) He was once more put on light duty and not sent to the
12 clinic. (*Id.*) Mr. Nhek finally went to the clinic for evaluation and treatment on October
13 5, 2015, and thereafter was placed on additional light duty. (*Id.* ¶ 31.) On October 5,
14 2015, Shane Quinn attributed Mr. Nhek's injury to "[f]ailure to properly execute,"
15 "rushing," and "chancetaking [sic]." (*Id.* ¶ 32.)
16

17 Mr. Nhek further alleges that on October 14, 2015, "light duty employees were
18 forbidden to talk to each other by David Siggins" and were "physically separated." (*Id.*
19 ¶ 34.) On October 19, 2015, the light duty employees were informed by Darin Stenstrom
20 that he "was going to develop a metric system to increase the light duty production." (*Id.*
21 ¶ 35.) The next day, the light duty employees were again admonished that they were not
22 allowed to talk to one another. (*Id.* ¶ 36.) On October 22, 2015, Mr. Alvarado informed
23 them that "upper management wanted them moved back into their departments so they
24 could see them from their offices." (*Id.* ¶ 37.) The next day, they were "moved between
25 two loud and large industrial pallet wrappers" that had a "burning plastic smell." (*Id.*
26 ¶ 38.) The employees requested to be moved to a safer area after "close calls with
27 forklifts, falling pallets, and the spinning arms discarding debris." (*Id.*) Mr. Nhek alleges
28

1 that the light duty employees were “also harassed for using a particular bathroom” and
2 the workers’ complaints about such harassment were ignored. (*Id.* ¶ 39.)

3
4 In late November 2015, Mr. Nhek was ordered to operate a forklift in the freight
5 department, which caused him “great back discomfort.” (*Id.* ¶ 40.) Upon telling Kent
6 Brierly that Mr. Nhek’s physician recommended he discontinue operating the forklift,
7 Mr. Brierly “was visibly upset and disgusted.” (*Id.*) Mr. Nhek alleges that this
8 “treatment was consistent with the ostensible disapproval from management of the light
9 duty employees.” (*Id.*)

10
11 While on light duty, Mr. Nhek had applied for posted positions in facilities
12 management and was not hired. (*Id.* ¶ 41.) He received an annual performance review of
13 “poor” on November 20, 2015, stating that he had “lost his passion for the Uline mission
14 and department goals.” (*Id.*)

15
16 On December 17, 2015, an MRI of Mr. Nhek “revealed torn tissue, intervertebral
17 disc degeneration, disc bulges, and an acute annular tear.” (*Id.* ¶ 43.) He then took
18 CFRA leave from December 28, 2015 until January 11, 2016, and from February 12,
19 2016, until March 1, 2016. (*Id.* ¶¶ 44, 48.) Defendant Jason Becher, distribution
20 manager, along with human resources representative Amanda Russell, signed the leave
21 paperwork. (*Id.*) On April 29, 2016, he notified Mr. Burns of his physician’s opinion
22 that he could not lift more than twenty pounds, which “was noted to be a permanent
23 restrictions [sic].” (*Id.* ¶ 49.) Less than a month later, Mr. Becher, accompanied by Jim
24 Jacobsen from human resources, terminated Mr. Nhek on May 19, 2016. (*Id.* ¶ 50.) At
25 first, Mr. Nhek was not given a reason for his termination. (*Id.*) When Mr. Nhek
26 complained, Mr. Becher “said he was being terminated because of his permanent
27 restrictions.” (*Id.*)

1 In December 2015 and January 2016, another light duty employee by the name of
2 Derek Kinnison received the lowest possible rating, was also blamed for his own work-
3 related back injury, and was fired. (*Id.* ¶¶ 45–47.) Between 2015 and 2016, all four
4 employees on light duty with Mr. Nhek were fired by Uline. (*Id.* ¶ 51.)

5
6 Mr. Nhek then initiated this lawsuit against Uline, Mr. Burns, Mr. Ochoa, and Mr.
7 Becher. (*See generally* Compl.) After Defendants removed the case to this Court, Mr.
8 Nhek moved to remand it to San Bernardino Superior Court for lack of diversity
9 jurisdiction. (*See generally* Mot.) Defendants oppose the motion, arguing that there is
10 diversity jurisdiction; they contend that Mr. Nhek is a California resident, Uline is not
11 incorporated in California and does not have its principal place of business here, and
12 although Mr. Burns, Mr. Ochoa, and Mr. Becher are California residents, they were
13 fraudulently joined. (*See generally* Dkt. 1; Opp.)

14 15 **III. DISCUSSION**

16
17 In assessing whether there is proper subject matter jurisdiction, courts disregard the
18 citizenship of a defendant that has been fraudulently joined. *Morris v. Princess Cruises,*
19 *Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). “Joinder is fraudulent if the plaintiff fails to
20 state a cause of action against a resident defendant, and the failure is obvious according to
21 the settled rules of the state.” *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th
22 Cir. 2009) (quotation omitted). Conversely, “if there is *any possibility* that the state law
23 might impose liability on a resident defendant under the circumstances alleged in the
24 complaint, the federal court cannot find that joinder of the resident defendant was
25 fraudulent, and remand is necessary.” *Id.* at 1044 (emphasis added). Fraudulent joinder
26 must be proven by “clear and convincing evidence,” *Hamilton Materials, Inc. v. Dow*
27 *Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007), and a defendant may present
28 additional facts to show that the joinder is fraudulent, *McCabe v. Gen. Foods Corp.*, 811

1 F.2d 1336, 1339 (9th Cir. 1987). However, in determining whether a defendant was
2 fraudulently joined, all disputed questions of fact and all ambiguities in the controlling
3 state law must be resolved in favor of remand to state court. *Hunter*, 582 F.3d at 104 at
4 1042. ““There is a presumption against finding fraudulent joinder, and defendants who
5 assert that plaintiff has fraudulently joined a party carry a heavy burden of persuasion.””
6 *Onelum v. Best Buy Stores L.P.*, 948 F. Supp. 2d 1048, 1051 (C.D. Cal. 2013) (quoting
7 *Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001)).
8

9 Defendants’ argue that very few of Mr. Nhek’s allegations specifically identify Mr.
10 Burns, Mr. Ochoa, and Mr. Becher (the “Individual Defendants”), and the ones that do
11 cannot form the basis of a harassment claim because they “relate to mere personnel
12 management decisions.” (Opp. at 7–12.) Under FEHA, only an employer, and not
13 “individual supervisory employees,” may be personally liable for “discriminatory hiring,
14 firing, and personnel practices.” *Leek v. Cooper*, 194 Cal. App. 4th 399, 408, (2011)
15 (citing *Reno v. Baird*, 18 Cal.4th 640 (1998)). “By contrast, individuals may be held
16 liable under FEHA for harassment.” *Id.* Even so, contrary to Defendants’ assertions,
17 official employment actions are not per se shielded from harassment claims, but rather,
18 “can provide evidentiary support for a harassment claim by establishing discriminatory
19 animus on the part of the manager responsible for the discrimination, thereby permitting
20 the inference that rude comments or behavior by that same manager was similarly
21 motivated by discriminatory animus.” *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 709
22 (2009), *as modified* (Feb. 10, 2010). For example, “in some cases the hostile message
23 that constitutes the harassment is conveyed through official employment actions, and
24 therefore evidence that would otherwise be associated with a discrimination claim can
25 form the basis of a harassment claim.” *Id.* at 708 (citing a case where “the immediate
26 source of the plaintiffs’ alleged injuries was the offensive sex-biased message that the
27 supervisor conveyed, not a demotion or an unfavorable job assignment, and therefore the
28 plaintiffs’ cause of action was for harassment, not for discrimination. Nevertheless,

1 official employment actions constituted the evidentiary basis of the harassment cause of
2 action, because the supervisor used those official actions as his means of conveying his
3 offensive message.”).

4
5 Although the Court agrees with Defendants that the allegations against the
6 Individual Defendants describing conduct that could constitute harassment are sparse,
7 their argument is more appropriate for a motion to dismiss. “[A] defendant seeking
8 removal based on an alleged fraudulent joinder must do more than show that the
9 complaint at the time of removal fails to state a claim against the non-diverse defendant.”
10 *Padilla v. AT & T Corp.*, 697 F. Supp. 2d 1156, 1159 (C.D. Cal. 2009). “In other words,
11 ‘[r]emand must be granted unless the defendant shows that the plaintiff would not be
12 afforded leave to amend his complaint to cure the purported deficiency.’” *Rangel v.*
13 *Bridgestone Retail Operations, LLC*, 200 F. Supp. 3d 1024, 1033 (C.D. Cal. 2016)
14 (quoting *Nasrawi v. Buck Consultants, LLC*, 776 F. Supp. 2d 1166, 1170 (E.D. Cal.
15 2011)).) Under the framework provided in *Roby*, Mr. Nhek’s allegations concerning the
16 Individual Defendants, such as their decisions to put him on light duty rather than send
17 him to the medical clinic and to ultimately fire him, could be the means by which the
18 Individual Defendants conveyed a discriminatory message. Furthermore, Mr. Nhek
19 could amend his complaint to provide additional allegations demonstrating that the
20 harassment was “sufficiently pervasive so as to alter the conditions of employment and
21 create an abusive working environment.” (Opp. at 8 (quoting *Fisher v. San Pedro*
22 *Peninsula Hosp.*, 214 Cal. App. 3d 590, 608 (1989)).) Such allegations would be
23 plausible against the backdrop of Uline’s alleged discrimination against light duty
24 employees, based on its pattern of ignoring complaints of physical injury, refusing to
25 send injured employees to the medical clinic, blaming employees for their injuries,
26 placing increased restrictions on light duty employees (including their ability to talk to
27 each other or use a certain bathroom), placing them in unsafe working conditions, giving
28 light duty employees negative reviews, and ultimately firing all of the light duty

1 employees in Mr. Nhek’s cohort. (*See generally* Compl.) That Defense Counsel
2 “offered” Mr. Nhek a prior occasion to amend his Complaint and he decided not to at that
3 time is insufficient to show that Mr. Nhek could not *possibly* cure any potential
4 deficiencies.² (*See* Opp. at 20.) Since Mr. Nhek and the Individual Defendants are
5 California residents and Defendants have failed to meet the high burden of showing
6 fraudulent joinder, there is no diversity jurisdiction and the case must be remanded.³

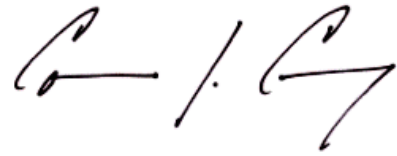
19 ² Since Defendants have not shown that Mr. Nhek could not possibly state a claim of harassment against
20 the Individual Defendants, the Court need not consider the parties’ arguments concerning Mr. Nhek’s
21 defamation claim against Mr. Becher or their dispute about Uline’s principal place of business.

22 ³ Defendants incorrectly assert that Mr. Nhek’s motion to remand is untimely. (Opp. at 5–6.) “A
23 motion to remand the case on the basis of any defect *other than lack of subject matter jurisdiction* must
24 be made within 30 days after the filing of the notice of removal.” 28 U.S.C. § 1447(c) (emphasis
25 added). Mr. Nhek’s motion clearly asserts that the Court’s subject matter jurisdiction is lacking because
26 the parties are not completely diverse, (*see generally* Mot.), so the thirty-day deadline is inapplicable
27 here. Defendants argue that the thirty-day deadline applies because Mr. Nhek invokes 28 U.S.C. §
28 1441(b)(2), which provides that an action otherwise removable on the basis of diversity jurisdiction
“may not be removed if any of the parties in interest properly joined and served as defendants is a
citizen of the State in which such action is brought.” (Opp. at 6.) The Ninth Circuit has held that a
motion to remand under Section 1441(b)(2) is based on a procedural defect that is subject to the thirty-
day time limitation. *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 939–42 (9th Cir. 2006). However,
Section 1441(b)(2) concerns situations where the parties are completely diverse, such as when an out-of-
state plaintiff sues a defendant in their home state. The statute is inapplicable here since the parties are
not completely diverse—both the Plaintiff and at least some of Defendants are California residents.

1 **IV. CONCLUSION**

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3 For the foregoing reasons, Mr. Nhek's motion is GRANTED and this case is
4 HEREBY REMANDED to San Bernardino Superior Court. (Dkt. 13.) Defendants'
5 pending motions to strike and for judgment on the pleadings are accordingly DENIED
6 AS MOOT. (Dkts. 15, 16.)

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8 DATED: August 2, 2017



10 CORMAC J. CARNEY
11 UNITED STATES DISTRICT JUDGE
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